

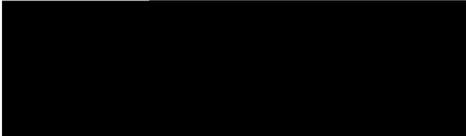
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H2



Date: DEC 29 2011 Office: CHICAGO FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident wife and U.S. citizen children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated June 10, 2009.

On appeal, counsel for the applicant asserts that the applicant's wife and children will suffer extreme hardship should the present waiver application be denied. *Statement from Counsel on Form I-290B*, dated July 9, 2009.

The record contains, but is not limited to: a brief from counsel; a report on the applicant's wife from a licensed clinical social worker; documentation regarding the applicant's child's academic activities; statements from the applicant, as well as the applicant's wife and others in support of the application; documentation in connection with the applicant's family's employment, homeownership, and finances; evidence of the applicant's wife's medical insurance; a letter from the applicant's church; reports on conditions in Mexico; an article on the impact of children residing in fatherless homes; and documentation regarding the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on

conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant pled guilty to Retail Theft under 720 ILCS § 5/16A-3(a) and Obstruction of Justice under 720 ILCS § 5/31-4(a) for his conduct on October 2, 1997. At the time of the applicant’s conviction for retail theft, 720 ILCS § 5/16A-3(a) stated:

Offense of Retail Theft. A person commits the offense of retail theft when he or she knowingly:

(a) Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The plain language of 720 ILCS § 5/16A-3(a) shows that all offenses under the section involve permanent takings. Thus, all offenses under 720 ILCS § 5/16A-3(a) constitute crimes involving moral turpitude.

At the time of the applicant’s conviction for obstruction of justice, 720 ILCS § 5/16A-3(a) stated:

Obstructing Justice. A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts:

(a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information

The present matter arises within the jurisdiction of the Seventh Circuit Court of Appeals. In *Padilla v. Gonzales*, the Seventh Circuit examined a conviction for obstruction of justice that involved facts

similar to those that led to the applicant's conviction, and determined that all offenses under 720 ILCS § 5/16A-3(a) constitute crimes involving moral turpitude. *Padilla v. Gonzales*, 397 F.3d 1016, 1019-1021 (7th Cir. 2005).

The AAO acknowledges counsel's assertions that the field office director made erroneous assertions in assessing the applicant's criminal history. Specifically, counsel takes issue with the field office director's statement that the applicant failed to address his DUI arrest and other citations before the prospect of receiving an immigration benefit arose. The AAO does not find that the applicant is prejudiced by the timeliness of his effort to address his offenses. It is further noted that the applicant's use of different names in his arrests has been addressed by the fact that he was convicted of obstruction of justice for this act, and any negative inferences drawn from this act are appropriately discussed in the context of addressing the criminal conviction itself.

The applicant's convictions for Retail Theft under 720 ILCS § 5/16A-3(a) and Obstruction of Justice under 720 ILCS § 5/31-4(a) constitute crimes involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal. He requires a waiver under section 212(h) of the Act.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and children are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the

combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

In a statement submitted with the Form I-601 application, the applicant's wife provided that she and their three children will suffer hardship should the applicant reside outside the United States. She explained that she was born in Mexico and immigrated to the United States. She noted that she met the applicant in 1993 and they began to reside together soon after. She provided that they have three children, now ages 16, 14, and 11. She asserted that she and their three children will face emotional and economic difficulty should they remain in the United States without the applicant. She listed numerous expenses she would have, including day care, health insurance, rent, utilities, food, clothing, health care, school supplies, gifts, transportation including travel to Mexico, communications, wire transfer fees, and funds to help support the applicant in Mexico. The applicant's wife expressed that she fears for the hardship her children would endure due to being raised in the United States with a single parent. She noted that the applicant is a great father and embraces his responsibility as a husband. She provided that family separation would cause emotional difficulty for her, and she has concern for the strain a long-distance relationship would create for her and the applicant.

The applicant's wife provided that she and their daughters would also suffer hardship should they relocate to Mexico with the applicant. She noted that she would like to become a U.S. citizen, and she would face emotional difficulty giving up her lawful permanent residence. She provided that she and the applicant would lose their employment in the United States, and they would face difficult economic circumstances in Mexico. She cited economic statistics in Mexico, and voiced her concern for their ability to meet their needs there. She stated that their daughters would face hardship should they continue their education in Mexico, as their English language skill would erode and they would be viewed as foreigners should they returned to the United States. The applicant's wife explained that she has health care that covers her and the applicant, and their children are covered by a program of the State of Illinois. She expressed concern for the quality of healthcare in Mexico, and her family's access to any needed medication or services.

In a brief dated August 7, 2009, counsel provides that the applicant married his wife on March 14, 1997, they have three children, and his wife and children will suffer extreme hardship should the waiver application be denied. Counsel states that the applicant's family members began treatment sessions with a mental health worker who has concluded that the applicant's wife and three daughters would be compelled to relocate with the applicant because the applicant's wife would be unable to care for their children alone. Counsel adds that a mental health assessment states that the applicant's

children would experience severe hardship should they join the applicant in Mexico or stay in the United States without him.

Counsel asserts that the applicant's wife and children will face significant financial difficulty should the applicant depart the United States. Counsel states that the applicant and his wife share in generating income for their household, and that the applicant's wife and three children would drop to barely above the national poverty line should they lose the applicant's contribution.

Counsel takes issue with the field office director's assertion that the applicant's wife would have emotional support due to the fact that she has family members in the United States. Counsel contends that the applicant's wife will suffer emotional hardship should she relocate to Mexico due to numerous factors including the possible loss of her lawful permanent residence. Counsel notes that the applicant's wife has resided in the United States since the age of 17, for half of her life, and that assimilation back to Mexico would be difficult. Counsel provides that the applicant's children are emotionally and financially dependent on the applicant, and that the applicant's wife's difficulty would be compounded due to sharing in the hardship her children would endure.

The applicant submitted a report from a licensed clinical social worker, [REDACTED] who indicated that she met with the applicant, his wife, and their three children in a two-hour session. [REDACTED] described the applicant's and his wife's history including that the applicant came to the United States in 1992 at age 19, and he has never left. [REDACTED] explained that the applicant's wife has never lived independently of her parents or the applicant, and she would not know what to do to take care of herself and her daughters in the applicant's absence. [REDACTED] noted that the applicant's wife has a sixth-grade education and no vocational training, and that she works less than full time at a laundry at a rate of \$10.75 per hour - a position she has held for the past 10 years.

[REDACTED] discussed the applicant's three children, their academic and extracurricular activities, health, and goals. She observed that each of the children are close with the applicant, and they have fear of becoming separated from him or relocating to Mexico. [REDACTED] indicated that the applicant's youngest daughter may have special educational needs, and that she is particularly attached to the applicant. [REDACTED] commented that the applicant's wife and children are able to visit with their relatives frequently, including the applicant's wife's parents, grandparents, sisters, and brothers, all who reside in the Chicago area. [REDACTED] reported that the applicant's children visit with their extended paternal family at least weekly, and that the applicant's wife and children have been surrounded by their extended family for most of their lives. [REDACTED] discussed challenges the applicant's family members would face in Mexico, including separation from their family and difficulty obtaining educational services and medical care.

Upon review, applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The record supports that the applicant's wife will face extreme hardship should she relocate to Mexico. The applicant's wife has resided in the United States for a lengthy period, since the age of 17, and she has extensive ties to the country including three U.S. citizen children, a home and other property, long-term employment, health insurance, a religious community, as well as the presence of her parents, siblings, and other relatives. The AAO

acknowledges that now severing these ties and returning to Mexico would create significant emotional difficulty for her.

The AAO has carefully examined the report from [REDACTED]. While the report was generated after meeting with the applicant's family members for only a two-hour session, it is valuable for the background it provides on the applicant's wife and children. The fact that the applicant's wife and children have resided near their extended family for most of their lives would contribute to their emotional difficulty they would experience should they now relocate to Mexico.

The applicant's wife expressed that she fears that her family would face economic difficulty in Mexico. The record shows that the applicant and his wife have modest means in the United States for a family of five, and his wife has limited education or vocational training. Although the applicant has not submitted evidence that shows he and his wife would be unable to secure employment that is sufficient to meet their basic needs in Mexico, due consideration is given to the applicant's wife's concerns for their financial well-being, and the challenges of supporting three children.

[REDACTED] discussed the individual circumstances of each of the applicant's children. Relocating a child to Mexico at age 16, 14, or 11 after exclusive residence in the United States would often create significant psychological hardship for the child. The AAO acknowledges the applicant's wife's concern for her children's continued access to quality education and medical care, and [REDACTED] observation that the applicant's youngest daughter may have special educational needs. Hardship to the applicant's children would contribute substantially to the applicant's wife's psychological difficulty.

The AAO also acknowledges that the applicant's wife would potentially lose her permanent residence in the United States, and that this event would constitute an emotional loss for her.

Considering the totality of the applicant's wife's circumstances, should she relocate to Mexico she would suffer extreme hardship.

The applicant has also shown that his wife would endure extreme hardship should she remain in the United States without him. The applicant has provided explanation to show that he plays an integral role in his household, including providing emotional support for his children and wife, and earning an equal share of the income. It is evident that the applicant's departure from this household would create substantial hardship for his wife. While the applicant has not provided complete evidence of his household expenses, the record shows that his wife earns modest income¹ that would make supporting one adult and three children difficult.

¹ In a letter dated December 8, 2006, the applicant's wife's employer provided that she had worked at the company since March 9, 1999, and that she had earned \$23,444.17 that year to date. The applicant's wife continued to work for this company as of June 20, 2007. The record supports the indication by [REDACTED] that the applicant's wife has limited education and vocational training, thus limited earning potential.

Applicant and his wife have been together since approximately 1993, all of the applicant's wife's adult life. It is evident that now separating would create significant emotional hardship for the applicant's wife. The AAO recognizes that the applicant's wife has not lived independently, and that the burden of now becoming a single parent with three children would pose unusual difficulty for her. The record reflects that the applicant's wife has significant support from close family members in the United States. However, the AAO finds that this support does not minimize the psychological hardship of losing the presence of a close spouse or domestic partner of approximately 18 years.

The report from [REDACTED] supports that the applicant's three daughters share a close bond with him, and that they would suffer great emotional difficulty in removing him from their household. It is evident that their emotional hardship would impact the applicant's wife.

All elements of hardship to the applicant's wife must be considered in aggregate to determine the totality of the circumstances she faces. The AAO finds that, should the applicant's wife remain in the United States without the applicant, the sum of her challenges would distinguish her hardship from the common difficulty faced by individuals who become separated from a spouse due to inadmissibility. Based on the foregoing, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to his wife, as required for a waiver under section 212(h) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection, and remained for a lengthy duration without a legal immigration status. The applicant has been convicted of criminal offenses that call into question his veracity and respect for the laws of the United States, including theft and obstruction of justice. The applicant has also been convicted of two offenses of driving under the influence, and he was charged for a third offense for his conduct in 1999 that remains unresolved.

The positive factors in this case include:

The applicant's lawful permanent resident wife will suffer extreme hardship should the applicant reside outside the United States. The applicant's U.S. citizen daughters will face hardship should he depart the United States. The applicant has resided in the United States since 1992, and he will face difficulty should he return to Mexico. The applicant has provided emotional and financial support for his lawful permanent resident wife and three U.S. citizen children.

The applicant's criminal activity serves as a strong negative factor in this case. The AAO is troubled by the fact that the applicant repeatedly engaged in driving under the influence. However, [REDACTED]

█ noted that the applicant completed court-ordered substance-abuse treatment, and that the applicant reported that he no longer uses alcohol irresponsibly. This assertion is supported by the fact that the applicant has not been charged with further offenses of driving under the influence since 1999, in approximately 12 years. The AAO is sufficiently persuaded that the applicant has resolved his prior abuse of alcohol that posed a serious risk to others residing in the United States. The record does not show that the applicant has a propensity to engage in further criminal acts. The AAO finds that the applicant's presence in the United States poses significant benefits for his wife and children, and that these positive factors outweigh the gravity of his prior misconduct. Accordingly, the AAO finds that the positive factors in this case overcome the negative factors, and the applicant warrants a favorable exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.